Supreme Court, U.S.
FILED

No. 02 6 22 OCT 1 6 2002

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

NORA Z. RAMOS,

Petitioner,

- against -

GEORGE L. COBB, Hon.,
as Justice of the Supreme Court
of the State of New York, County of Greene,
PATTEN CORP. (or BLUEGREEN CORPORATION,
as Successor in Interest to Patten Corporation);
and ROBERT W. BIRCH, ESQ.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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63 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals err in affirming the District Court's judgment that dismissed sua sponte the petitioner's claims even before the respondents can answer the complaint, considering that she had presented concrete particulars establishing a prima facie case of discrimination that placed the burden upon the respondents to produce admissible evidence to rebut the presumption of racial discrimination in petitioner's favor?

2. Did the U. S. Court of Appeals err in deciding that the petitioner's federal claims are "inextricably intertwined" with the state court action inasmuch as the two lawsuits have different parties and distinct causes of action and no discrimination issue was presented nor actually and necessarily decided against the respondent Patten/Bluegreen in the state court, instead, it was the discrimination by Robert W. Birch, the attorney for Patten/Bluegreen, that was raised and ignored by Judge in the state foreclosure action?

3. Did the United States Court of Appeals abuse its discretion by not specifying in its order that the property being foreclosed at the state court action was a vacant lot, thus evading the ministerial duties imposed upon the respondent Judge by the New York Banking Laws, Article 9, Section 350, paragraph 2, Sec. 355, par. 1, Article 12-D, Section 590, par. 1 (a) and (b), Art. 9, Sec. 351, par. 5 (b) (i) and Sec. 352, par. 3?

4. Did Judge Cobb have the ministerial duty to dismiss the complaint in his settled order dated February 9, 1998 vacating the judgment of foreclosure and sale of the petitioner's vacant lot dated October 9, 1997, there being no opposition, pursuant to CPLR 3211 (a) 8, for lack of personal jurisdiction, CPLR 3211

(a) 7, for failure to state a cause of action, and CPLR 3012 (b), for failure to serve the complaint demanded in the petitioner's motion to vacate said judgment of foreclosure/sale, filed on November 21, 1997?

5. When the respondents Patten/Bluegreen and Birch did not vacate the order of February 9, 1998 pursuant to CPLR 5015 and 2214, did it render void Judge Cobb's judgment of foreclosure and sale signed on April 11, 2000 and his order dated August 29, 2000 denying the petitioner's motions to dismiss the complaint and to vacate said judgment of foreclosure and sale of April 11, 2000?

6. Did the petitioner prove that the respondents have deprived her under color of state law of her rights protected by the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit are those in the caption. Patten Corporation (changed to Bluegreen Corporation on July 3, 1992) was included as one of the defendants in the original complaint and the petitioner had always corrected the caption omitting Patten Corporation as one of the defendants, but to no avail.

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No.

IN THE
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NORA Z. RAMOS,

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GEORGE L. COBB, Hon., as Justice of the Supreme Court of the State of New York, County of Greene,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit entered on May 20, 2002 and the order denying the petition for rehearing en banc dated July 18, 2002.

OPINIONS BELOW

The District Court, Northern District of New York, Honorable Judge Thomas J. McAvoy's decision dated December 14, 2000, filed on December 19, 2000 and his decisions entered on February 9, 2001 and February 22, 2001 are unreported. The judgment was entered on July 20, 2001.

The summary order of the Court of Appeals for the Second Circuit and the order denying the petition for rehearing en banc are also unreported.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on May 17, 2002 and May 20, 2002. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 USC 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV :

"No State shall deny to any person the equal protection of the laws.

Nor shall any State deprive any person of life, liberty or property without due process of law;"

28 U S C 1291:

grants the court of appeals jurisdiction "from all final decisions of the district courts of the United States ..... "

28 U S C 1343 (3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States .....".

Rule 25 (a) (4): Rule 25. Filing and Service

(a) Filing

(4) Clerk's Refusal of Documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

Federal Rules of Appellate Procedure

Rule 10 (e) (2) (C): Rule 10. The Record on Appeal

(e) Correction or Modification of the Record

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected

and a supplemental record may be certified and forwarded :

(c) by the Court of Appeals

Rule 26 (a) (3): Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or - if the act to be done is filing a paper in court - a day on which the weather or other conditions make the clerk's office inaccessible.

Federal Rules of Appellate Procedure

Rule 26. Computing and Extending Time

(c) Additional Time After Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

Rule 40 (a) (1) : Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment.

Federal Rules of Civil Procedure

Rule 52 (a) (b): Rule 52. Findings by the Court; Judgment on Partial Findings

(a) ..... Findings of fact, ... shall not be set aside unless clearly erroneous,

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings---.

Rule 59 (e): Rule 59. New Trials; Amendment of Judgments.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

McKinney's Consolidated Laws of New York

New York Banking Law

Article 9, section 350, paragraph 2 :

"No licensee shall take a lien upon real estate as security for any loan under the provisions of this article, except such lien as is created by law upon the recording of a judgment."

Article 9, section 351 par. 5 (b) (i):

"In the event of default of more than ten days in the payment of any scheduled installment, the licensee may charge and collect a default charge not

exceeding five percent of the installment in default. This charge may not be collected more than once for the same default and may be collected at the time of such default or at any time thereafter."

Article 9, section 352, par. 3:

"Every licensee shall permit payment to be made in any amount on any loan agreement at any time, but the licensee may initially apply such payment to all interest and other charges due to the date of such payment."

Article 9, section 355, par. 1:

"Any Loan made by a person not licensed under this article to a resident of this state, ... shall be void, and the lender shall have no right to collect or receive any principal, interest or charge whatsoever. No action to enforce a loan made in violation of this subdivision may be maintained ..... ".

New York Banking Law

Article 12-D, section 590, paragraph 1 (a) and (b) states:

(a) "Mortgage loan" shall mean a loan to a natural person ....., primarily secured by either a mortgage on residential real property ..... ".

(b) "Residential real property" shall mean real property located in this state improved by a one-to-four family dwelling ..... , but shall not refer to unimproved real property upon which such dwellings are to be constructed"

Civil Practice Law and Rules

CPLR 308: Personal service upon a natural person (7a)

CPLR 2214 (b): Sec. 2214. Motion papers service; time

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard.

CPLR 3012 (b) :

Sec. 3012. Service of pleadings and demand for complaint

(b) Service of complaint where summons served without complaint. ..... Service of the complaint shall be made within twenty days after service of the demand. ..... The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.

CPLR 3211 (a) 7 and 8 : Sec. 3211. Motion to dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action; or

8. the court has no jurisdiction of the person of the defendant; or

CPLR 5015: Relief from judgment or order (8a)

Real Property Actions and Proceedings Law

RPAPL 732 (3):

Sec. 732. Special provisions applicable in non-payment proceeding if the rules so provide

(3) If the respondent fails to answer within five days from the date of service, ... the judge shall render judgment in favor of the petitioner ..... .

RPAPL 749 (1): Sec. 749. Warrant

1. Upon rendering a final judgment for petitioner, the court shall issue a warrant directed to the sheriff of the county ..... to remove all persons, and ..... to put the petitioner into full possession.

STATEMENT OF THE CASE

Pursuant to 42 USCS 1983, a person cannot be deprived under color of state law of a right protected by the United States Constitution and its laws. In like manner, pursuant to Section 101 of the Civil Rights Act of 1991 (amending 42 USCS 1981), all persons within the United States have the same right to the full and equal benefit of all laws and proceedings for the security of persons and property. The right to equal protection of the law is a fundamental and well-established right guaranteed by the Fourteenth Amendment to the United States Constitution.

On May 20, 2002, the panel of the U S Court of Appeals for the Second Circuit affirmed the district court's judgment (1a)[1].

On July 18, 2002, the petition for rehearing en banc was denied (2a).

On November 28, 2000, the petitioner (Ramos) sued in the federal district court to vacate and enjoin the enforcements of Cobb, J.'s judgment of foreclosure and sale of her vacant lot signed on April 11, 2000 (A-IV-6)[2] and his order dated August 29, 2000 denying Ramos' motion to dismiss the complaint and to vacate the said judgment of foreclosure and sale (3a), for violation of her Fourteenth Amendment right to equal protection of the law.

---

[1] Materials appearing in the Appendix to this petition will be referred to as [_a"]

[2] Materials not included in the Apendix annexed hereto but which appeared in the Joint Appendix filed in the court of appeals shall be referred to as ["A_"]_

On December 14, 2000, the district court dismissed her complaint sua sponte before the respondents filed their answers, erroneously stating that the subject property was a former residence instead of a vacant lot and omitting Section 101 of the Civil Rights Act of 1991 (amending 42 USCS 1981). Although it dismissed the complaint against Cobb, J. and Birch, the order was not final, Ramos may file an amended complaint within 30 days from filing of the order but she was prohibited to sue Cobb, J. or Birch (4a).

Ramos moved for reconsideration of the order dated December 14, 2000 (filed on December 19, 2000) on the ground of clearly erroneous facts pursuant to Rules 52 (a) (b) and 59 (e), Federal Rules of Civil Procedure, postmarked January 4, 2001, set for hearing on Monday, February 12, 2001.

Notwithstanding that the district court dismissed the complaint against Cobb, Patten/Bluegreen and Birch on Friday, February 9, 2001 (5a), the order was not final, Ramos may file an amended complaint within 30 days from the date of said order but she cannot sue Cobb, J. The order denied Cobb, J.'s and "Bluegrass" motions to dismiss without prejudice because there is no pending complaint before the court.

Although Cobb, J.'s motion to dismiss and Ramos' motion for reconsideration were set for hearing on February 12, 2001, on February 5, 2001, the district court reset said motions for March 2, 2001, after returning Ramos' affidavits in opposition to Cobb, J.'s, Patten/Bluegreen's motions to dismiss and Birch's answer (A-VI), postmarked February 4, 2001 by Express mail, stamped filed at the district court on February 6, 2001, and her affidavit in reply to Patten/Bluegreen's opposition to her motion for reconsideration (A-VII), post-marked February 6, 2001

by Express mail, filed at the district court on February 7, 2001.

The district court rejected and returned the papers Ramos filed in person on Monday, February 12, 2001 before 10:00 A.M. such as her memoranda of law in opposition to Cobb, J.'s (A-VIII) and Patten/ Bluegreen's (A-IX) motions to dismiss and Birch's answer (A-VI), her corrections in the docket sheets that omitted in the caption the name of Patten Corp. as defendant (A-X), her letter to Hon. Judge T. J. McAvoy about said corrections (A-XI) and the affidavits of service of papers to Cobb, J. and Patten/Bluegreen on January 11, 2001.

The district court's one page order of February 22, 2001 amended the order of February 9, 2001 correcting "Bluegrass" to Bluegreen (6a).

The first notice of appeal filed on March 9, 2001 with Form C (Docket No. 01-7287) was dismissed sua sponte on June 6, 2001 for lack of jurisdiction because the district court's order was not final pursuant to 28 U S C 1291.

The Court of Appeals dismissed as moot Ramos' motion filed on April 3, 2001 pursuant to Rule 10 (e) (2) (C), Federal Rules of Appellate Procedure. The motion corrected the omissions and erroneous entries in the district court's docket sheets among others, specifically adding Patten Corporation as defendant in the caption and explaining that the docket entries of alleged motion hearings on February 12, 2001, March 2, 2001 and March 12, 2001 are false entries that never happened (A-XIII), entered solely to show that there were other proceedings after the February 9, 2001 order, to deprive Ramos of her right to appeal. In U.S. v. Interlink Systems, Inc. 984 F 2d 79, 82, (2nd Cir. 1993) it was held that "a party can appeal an order that has not been entered as a judgment if no other further proceedings are

contemplated". 01-7187, Petition for hearing with leave of court, filed 7/24/01.

Ramos' original petition for hearing to review the sua sponte order dismissing her appeal was timely filed on June 25, 2001 pursuant to Appellate Rules 40, 26 (c), 26 (a) (3).

Ramos' letter of July 5, 2001 conveyed to Beth J. Meador (Administrative Attorney, Clerk's Office, USCA, 2nd Cir.) that she is not authorized by law to return Ramos' said petition as unfiled pursuant to Appellate Rule 25 (a) (4), as stated in Meador's letter dated June 28, 2001 informing Ramos that the Court has no longer jurisdiction to act upon said petition.

The petition filed on June 25 and the letter of July 5, 2001 became a motion for leave to file a petition for rehearing out of time that was granted by the Court on July 11, 2001.

On July 24, 2001, Ramos filed a petition for a hearing with leave of Court to review the order dismissing her appeal, alleging that a plaintiff may amend the complaint after dismissal or treat the order as final and appealable, citing Schuurman v. Motor Vessel "Betty K V", 798 F 2d 442, 444, 445 (11th Cir. 1986), Festa v. Local 3 Int'l Bdh. of Elec. Workers, 905 F 2d 35, 37 (2nd Cir. 1990). Likewise, in Songbyrd, Inc. v. Estate of Grossman, 206 F 3d 172, 178 (2nd Cir. 2000), it was held that "a party may appeal from a dispositive order without awaiting entry of judgment".

On July 20, 2001, said petition was denied with a separate instruction to file a motion for reconsideration of the order filed on July 20, 2001. Said motion submitted on July 31, 2001 was denied on August 7, 2001.

On July 20, 2001, the district court issued a judgment dismissing the complaint in its entirety.

The second notice of appeal was filed on August 17, 2001 with Form C (Docket No. 01-9013).

On May 20, 2002, the panel of the U S Court of Appeals for the Second Circuit affirmed the district court's judgment without specifying that the property being foreclosed by Patten/ Bluegreen at the state court action was a vacant lot.

The panel ignored the fact that the complaint alleges that in Ramos' order to show cause filed on November 21, 1997 (A-IV-3), a motion to vacate the judgment of foreclosure and sale of her vacant lot dated October 9, 1997 (A-IV-2), she stated that the property mortgaged was a vacant lot and the one-family dwelling never existed as described in the mortgage dated October 6, 1985 recorded on February 12, 1986 at the Greene County Clerk's office, Catskill, New York (A-IV).

The panel did not consider that Ramos avers in her complaint that in said motion she proved that the New York State Deputy Superintendent of Banks informed her in a letter dated February 25, 1992, that Patten Corp. is not registered nor licensed by the New York State Banking Department and Article 12-D of the New York Banking Law does not apply to vacant lot (A-IV). (Patten Corp. became Bluegreen Corporation on July 3, 1992).

By the conduct of the panel, the respondents evaded their liability arising from Ramos' federal claims that they have discriminated against her in violation of her Fourteenth Amendment right to equal protection of the law, by their refusal to apply to her the provisions of the New York Banking Law, Article 9, sec. 355, paragraph 1 (any loan made by unlicensed person is void and unenforceable), Article 9, sec. 350, par. 2 (prohibits taking a lien upon real estate as security for a loan), Article 12-D, sec. 590, par. 1 (a) and (b) (only one to four family dwelling may be mortgaged but not a vacant lot), Article 9, section 352, par. 3 (payment to be applied to the principal and interest due to the date of such payment, upon receipt thereof, at one time, without spreading to several future monthly installments charging scheduled interests each time), and Article 9, section 351, par. 5 (b) (i) (permits a default charge of only 5% and not 1/3 of the installment in default) (A-IV).

The panel of the U S Court of Appeals for the Second Circuit determined that Ramos' complaint contained only conclusory allegations without factual basis sufficient to support a claim under Sections 1983 and 1981.

It failed to register in the minds of the panel that Ramos alleges in her complaint that Cobb, J. had discriminated against her in his settled order dated February 9, 1998 (A-IV-5) vacating the judgment of foreclosure dated October 9, 1997 (A-IV-2), there being no opposition, because Cobb, J. did not dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) 7, the complaint filed by Patten Corp. on October 1994 to foreclose a mortgage on her vacant lot (A-IV-I).

The panel disregarded that Ramos' federal claims also allege that in Cobb, J.'s settled order (Cobb, J.'s order dated December 5, 1997 vacating the October, 1997 judgment of foreclosure was erroneously dated September 5, 1997 (A-IV-4), he did not dismiss the state action for lack of personal jurisdiction over Ramos pursuant to CPLR 3211 (a) 8, although her motion of November 21, 1997 (A-IV-3) states that she was not served with the summons and complaint in 1994 pursuant to CPLR 308 (7a) and she received for the first time on November 7, 1997 a copy of the judgment of foreclosure dated October 9, 1997.

The allegation in the federal claims that Ramos did not hear from Robert W. Birch, the attorney for Patten/Bluegreen, until the second week of April 2000 (A-IV) shows that Birch did not serve Ramos with an order to show cause nor notice of motion to notify her of said foreclosure and sale at least eight or twelve days before the hearing of the motion (prior to October 9, 1997) pursuant to CPLR 2214 (b).

Ramos' suppressed affidavit in opposition to Birch's demand to dismiss the complaint (A-VI), her suppressed memoranda of law in opposition to Cobb, J.'s (A-VIII) and Patten/Bluegreen's motions to dismiss (A-IX) state that Birch did not vacate Cobb, J.'s order of February 9, 1998 pursuant to CPLR 5015 and he did not oppose nor respond to Ramos' motion filed on November 21, 1997 (sent to him on November 22, received on November 25, 1997 (A-IV-3) nor to the order of December 5, 1997 and the proposed order vacating the judgment of foreclosure/sale dated October 9, 1997 (sent to him on December 6, received on December 10,

1997 (A-IV-4) nor to the notice of entry of Cobb, J.'s order of February 9, 1998 (sent to him on March 25, received on March 27, 1998 (A-IV-5).

Ramos discussed that Cobb, J. discriminated against her in his settled order dated February 9, 1998 because he did not dismiss said complaint pursuant to CPLR 3012 (b) when Birch failed to serve the duly demanded complaint in Ramos' motion of November 21, 1997, within 20 days from November 25, 1997, a copy of the return receipt from Birch's office with said date (A-IV-3) was submitted to Cobb, J. in Ramos' notice of settlement of the order of December 5, 1997.

The complaint shows that Cobb, J. did not have jurisdiction over Ramos to render the judgment of foreclosure and sale he signed on April 11, 2000 entered on April 20, 2000.

Ramos alleges that she learned about the sale of her lot on June 8, 2000 in Birch' affidavit of May 15, 2000 (received on May 18, 2000), in opposition to her order to show cause of May 2, 2000, a motion to dismiss the 1994 complaint, to cancel the mortgage, lien and mortgage note on her vacant lot, and that Ramos verified with Philip Redington, the law clerk of Cobb, J., about the existence and the date of said judgment of foreclosure.

Ramos was not served with the order to show cause nor notice of motion to notify her of said foreclosure prior to April 11, 2000 pursuant to CPLR 2214 (b). Ramos' affidavit (# 22) sworn to and mailed January 4, 2001, filed at the district court January 8, 2001, in support of her motion for reconsideration of the district court's order of December 14, 2000.

For the reasons already discussed, Cobb, J. did not have jurisdiction over Ramos to issue his order dated August 29, 2000 entered on September 8, 2000, denying her motions to dismiss the 1994 complaint and to vacate the judgment of foreclosure signed on April 11, 2000.

The panel of the U S Court of Appeals for the Second Circuit concluded that Ramos' federal claims are "inextricably intertwined" with the state court's action and the district court lacked jurisdiction to review the state court decisions pursuant to the Rooker-Feldman doctrine (D. C. Court of Appeals v. Feldman, 460 U S 462, 482-87 & n. 16 (1983), Rooker v. Fidelity Trust Co., 263 U S 413, 416 (1923).

The panel stated that the district court may dismiss a frivolous complaint sua sponte in fee-paid complaint.

The panel also decided that the allegations in Ramos' complaint are mere conclusory that do not establish a prima facie case of discrimination and the sua sponte dismissal of the complaint absolved the respondents from producing legitimate, non-discriminatory explanations for their conduct.

The Court of Appeals did not consider the specific adverse actions towards Ramos giving rise to the inference of intentional discrimination, and by her allegations that she is a lawful immigrant of the United States of America, she established that she belongs to the protected class.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT AND THAT OF THE SAME COURT ON THE SAME IMPORTANT MATTERS

A. The Second Circuit Abused its Discretion in concluding that the Concrete Particulars alleged in the Complaint did not Establish a Prima Facie Case creating a Presumption of Discrimination in Plaintiff's favor

In Reeves v. Sanderson Plumbing Products, Inc., 120 S Ct 2097, 2106 (2000), St. Mary's Honor Center v. Hicks, 509 US 502, 506, (1993), and McDonnell Douglas Corp. v. Green, 411 US 792, 802 (1973), it was held that the establishment of a prima facie case creates a presumption of discrimination in plaintiff's favor, and imposed the burden upon the defendant to produce admissible evidence to rebut said presumption.

Ramos has established a prima facie case of discrimination by alleging in her complaint that she is a lawful immigrant of the United States of America, that Patten Corp. sued her to foreclose a mortgage on her vacant lot, a void and unenforceable mortgage pursuant to the New York Banking Law, Article 9, Section 350, par. 2 and Article 12-D, sec. 590, par. 1 (a) and (b), that Patten/Bluegreen's loan to her is void and unenforceable pursuant to the Banking Law, Article 9, sec. 355, par. 1 because Patten Corp. is not registered nor licensed by the N Y S Banking Department, that on November 21, 1997, she filed a motion to vacate the judgment of foreclosure and sale of her lot dated October 9, 1997 because aside from enforcing a void and unenforceable mortgage, she was not served with the summons and complaint pursuant to CPLR 308, nor was she notified of the foreclosure action pursuant to CPLR 2214

(b), that Cobb, J. issued an order on December 5, 1997 (erroneously dated September 5, 1997) vacating said judgment of foreclosure, the settled order was dated February 9, 1998, without opposition from Patten/Bluegreen nor Birch, that Cobb, J. did not dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) 7, for lack of personal jurisdiction pursuant to CPLR 3211 (a) 8, for failure to serve the duly demanded complaint within 20 days from November 25, 1997, the date Birch received the motion demanding the complaint, that Cobb, J. signed another judgment of foreclosure and sale of Ramos' vacant lot on April 11, 2000 although Patten/Bluegreen and Birch did not vacate the order dated February 9, 1998 pursuant to CPLR 5015 nor notified Ramos of said foreclosure action pursuant to CPLR 2214 (b), that Cobb, J. did not have jurisdiction to issue the order dated August 29, 2000 denying Ramos' motions to dismiss the complaint and to vacate the judgment of foreclosure and sale of her vacant lot signed on April 11, 2000.

The panel of the Court of Appeals for the Second Circuit abused its discretion in concluding that the above-mentioned concrete particulars are mere conclusory allegations and in affirming the district court's sua sponte dismissal of Ramos' federal claims before the respondents filed their answers purposely done to release them from their obligations to produce admissible evidence to explain the legitimate and non-discriminatory reasons for not applying the herein enumerated laws to Ramos in order to St. Mary's Honor Center v. Hicks, rebut the presumption of discrimination in her favor. 509 US 502, 507-508 (1993). Texas Dept. of Community Affairs v. Burdine, 450 US 248, 252-53 (1981).

B. The Second Circuit Erred in Affirming the District Court's Sua Sponte Dismissal of a Meritorious

Complaint based on Court Records with Details of Events Constituting Constitutional Violations

In Nance v. Kelly, 912 F 2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 US 319, 327, (1989), it was held that the district court may sua sponte dismiss a case "if satisfied that the action is frivolous or malicious" pursuant to 28 USC 1915 (d), when either:

(1) "the factual contentions are clearly baseless," such as when allegations are the product of delusion or fantasy;" or

(2) the claim is "based on an indisputably meritless legal theory.' "

Ramos' complaint was based on meritorious legal theories such as her right to equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution, Federal Law, 28 USCS 1343, 42 USCS 1983, Section 101 of the Civil Rights Act of 1991 (amending 42 USCS 1981).

The allegations in her complaint are supported by court records showing details as to date, place and events of the alleged constitutional violations by the respondents, far from being conclusory or the product of delusion or fantasy.

Patten/Bluegreen was "personally involved" and "directly participated in the constitutional deprivation". Williams v. Smith, 781 F 2d 319, 323 (2nd Cir. 1986). Ramos was sued by Patten to foreclose a void and unenforceable mortgage. Birch pursued the action by obtaining the judgments of foreclosure and sale of the vacant lot. Cobb, J. issued the judgments of foreclosure and the order denying Ramos' motions to dismiss and to vacate the judgment, disregarding the ministerial duties imposed upon him and the other

respondents by the New York Banking law and the Civil Practice Law and Rules.

Cobb, J., as a New York State Supreme Court judge, Birch as a practicing attorney and Patten/Bluegreen Corporation, having hired their attorney, have full knowledge of the records of the case and the applicable New York State laws and rules.

C. The Second Circuit Erred in Holding that the Federal Claims and the State Acton with Different Parties and Distinct Causes of Action are "inextricably intertwined" although no Discrimination Issue was Raised nor Actually and Necessarily Decided in the State Court

In Moccio v. New York State Office of Court Admn., 95 F 3d 195, 200 (2nd Cir. 1996), and Colon v. Coughlin, 58 F 3d 865, 869 (2nd Cir 1995), it was held that the doctrine of collateral estoppel (issue preclusion) applies if :

"(1) the issue in question was actually and necessarily decided in a prior proceeding, and

(2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding."

The Rooker-Feldman doctrine (D. C. Court of Appeals v. Feldman, 460 US 462 (1983) does not apply to the federal claims of Ramos. Said claims are not barred under the principles of preclusion categorized as: res judicata (claim preclusion) and collateral estoppel (issue preclusion).

Her federal claims are not "inextricably intertwined" with the state court action. Hachamovitch v. DeBuono, 159 F 3d 687, 695 (2d Cir. 1998). Ramos did not present any discrimination issue against Patten/Bluegreen at the state court, no such issue was actually and necessarily decided in the state court proceedings. The judgments of foreclosure and Cobb, J.'s orders did not discuss nor decide the issue of violation of her Fourteenth Amendment right to equal protection of the law. Ramos did not have the full and fair opportunity to litigate said issue in the state court.

The res judicata (claim preclusion) doctrine does not apply to her federal claims because the state court action has different parties and distinct causes of action. Cobb, J. and Birch (attorney for Patten/ Bluegreen in the state court) were not parties at the state court action. Cobb's decision dealt with Ramos' s motions to dismiss the complaint for foreclosure and sale of her vacant lot, to cancel the mortgage, the note, the lien on her vacant lot and to vacate the judgment of foreclosure and sale signed on April 11, 2000. Cobb, J.'s order dated August 29, 2000 summarily denied her said motions.

As admitted in Patten/Bluegreen's brief, Cobb, J. ignored her complaint about Birch's pattern of discriminatory conduct against her that appeared in her affidavit (# 8) of May 30, 2000, in support of her motion filed on June 2, 2000 to vacate the said judgment and to stop the sale of her vacant lot

on June 8, 2000, and in her affidavit (#s 27 & 28) of November 12, 2000, in support of her motion filed on November 14, 2000 to stop the sale of her lot on November 16, 2000. Cobb, J., did not resolve the issue of Birch's discrimination against her.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW WHETHER A JUDGE MAY BE SUED FOR THE NON-PERFORMANCE OF A MINISTERIAL DUTY

A. The Court of Appeals Abused its Discretion in Absolving the Judge in his Liability for the Non-Performance of his Ministerial Duties

Judge Cobb was imposed the ministerial duty to do that which the New York Banking Law and the Civil Practice Law and Rules require him to do.

The New York Court of Appeals ruled that mandamus may issue against a judge to compel the performance of a ministerial duty imposed by law pursuant to RPAPL 732 (3) and 749 (1). Matter of Mennella v. Lopez-Torres, (1998) 91 N Y 2d 474. Matter of Brusco v. Braun, (1994) 84 N Y 2d 674. Cobb, J. does not have absolute immunity from a damage suit under 42 USCS 1983.

"It is the nature of the function performed ..... rather than the identity of the actor who performed it ..... that determines whether absolute immunity attaches to the act." Kalina v. Fletcher, 118 S Ct 502 (1997). Forrester v. White (1988), 484 US 219, 229.

Judicial immunity protects the discretionary decision-making function of a judge. Antoine v.

Byers & Anderson, Inc., (1993), 508 US 429, 435, 436.

"Judges acting to enforce the Bar Code would be treated like prosecutors, and thus would be amenable to suit for injunctive and declaratory relief". Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 US 719, 734-736 (1980). Forrester v. White, 484 US 219, 228 (1988).

In the past, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Act. The Court assumed that the judge was merely performing a ministerial function. Justice Douglas, dissenting (386 US 563), citing Ex parte Virginia, 100 US 339 (1880). Pierson v. Ray, (1967), 386 US 547, 563.

"A judge is liable for injury caused by a ministerial act; ..... " 386 US 567 (footnote # 6).

The liability of judges for the non-performance of a ministerial duty as distinguished from his discretionary function must be defined.

Notwithstanding the 1996 amendments to 42 USCS 1983, the judges may be sued in Section 1983 action for the purpose of obtaining declaratory relief. Nollet v. Justices of Trial Courts of Com. of MA, 83 F Supp. 2d 204, 210 (D. Mass. 2000).

For the reasons enumerated herein, Cobb, J. is amenable to suit in these Sections 1983 and 1981 action.

III. THIS CASE PRESENTS THE QUESTION WHETHER 42 USCS 1983 APPLIES TO THE PRIVATE ACTS OF DISCRIMINATION BY BIRCH AND PATTEN/BLUEGREEN

A. The Court of Appeals Abused its Discretion in Claiming that Ramos applied 42 U S C S 1983 to the Private Acts of Discrimination of Birch and Patten/Bluegreen

Section 101 of the Civil Rights Act of 1991 (amending 42 USCS 1981) that protects specific rights applies to the intentional private acts of racial discrimination by Birch and Patten/Bluegreen against Ramos. Runyon v. McCrary 427 US 160 (1976). St. Francis College v. Al-Khazraji, 481 US 604 (1987).

The Court's holding that a private party is a "state actor" pursuant to 42 USCS 1983, by jointly participating with state officials in the seizure of constitutionally protected property, solely applies to cases involving prejudgment attachment procedures. Lugar v. Edmonson Oil Co., 457 US 922 (1982). Dahlberg v. Becker, 748 F 2d 85 (2nd Cir. 1984), cert. denied 470 US 1084 (1985).

Ramos' claims do not involve prejudgment attachment procedures. Birch and Patten/Bluegreen are not "state actors". 42 USCS 1983 does not apply to Birch and Patten/Bluegreen's private acts of discrimination.

IV. THIS CASE PRESENTS THE QUESTION WHETHER RAMOS WAS RELEASED BY BLUEGREEN UPON FILING SUBSTITUTE FORMS 1098, IN 1996, 1997 AND 1998 WITH INTERNAL REVENUE SERVICE

Bluegreen had released Ramos from any obligation with the company upon reporting to the Internal Revenue Service in Substitute Forms 1098, in 1996, 1997 and 1998, showing each time that Ramos has a principal balance of $22,258.16.

V. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Queens, New York
October 15, 2002

NORA Z. RAMOS
Pro se
30-69 Hobart Street, # B3I
Woodside, New York 11377

(718) 956 –1854

APPENDIX 1
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

US COURT OF APPEALS
FILED
MAY 20, 2002
2ND CIRCUIT

CORRECTED
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of May, two thousand and two.

PRESENT: Hon. John M. Walker, Jr.,
Chief Judge
Hon. Ralph K. Winter,
Hon. Robert A. Katzmann,
Circuit Judges.

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NORA Z. RAMOS,
Plaintiff-Appellant,

v.

No. 01-9013

GEORGE L. COBB, as Justice of the Supreme Court of the State of New York, County of Greene; BLUEGREEN CORP. as Successor in Interest to Patten Corporation), and ROBERT W. BIRCH, ESQ.,
Defendants-Appellees.

----------x

APPEARING FOR APPELLANT:
NORA Z. RAMOS, pro se,
Woodside, NY

APPEARING FOR APPELLEE COBB:
KATHLEEN M. TREASURE,
Assistant Solicitor General
(Eliot Spitzer, Attorney General of the
State of New York, Nancy A. Spiegel,
Assistant Solicitor General,
on the brief), Albany, NY

APPEARING FOR APPELLEE BLUEGREEN:
ROGER K. QUILLEN, Fisher & Phillips LLP
(Myra K. Creighton, on the brief),
Atlanta, GA

APPEARING FOR APPELLEE BIRCH:
SCOTT W. BUSH, Roche, Corrigan,
McCoy & Bush,
Albany, NY

Appeal from the United States District Court for the Northern District of New York (Thomas J. McAvoy, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED**.

Plaintiff-appellant Nora Z. Ramos appeals from the July 20, 2001 judgment of the district court dismissing her claims of constitutional violations and racial discrimination brought, pursuant to the Fourteenth Amendment, 42 U.S.C. § 1983, and 42 U.S.C. § 1981, against defendants-appellees George Cobb, a New York Supreme Court justice, Bluegreen Corporation, as successor in interest of Patten Corporation (collectively "Bluegreen"), and Robert Birch, an attorney who represented Bluegreen.

Ramos's claims arise from a state court action brought by Bluegreen to foreclose on certain vacant property owned by Ramos and secured by a mortgage held by Bluegreen. Ramos's complaint alleged that Birch and Bluegreen engaged in intentional discrimination against her by not properly allocating payments on her mortgage and by failing to serve her with the summons and complaint or with notices of the entry of judgment and scheduled foreclosure sales. Ramos alleged that Cobb, the judge who presided over the foreclosure action, also intentionally discriminated against her by exercising personal jurisdiction over her and refusing to dismiss the complaint and vacate the judgment of foreclosure, despite Birch's alleged failure to serve her with the summons and complaint and the applicability of certain Banking Law provisions that Ramos asserts rendered the mortgage void and foreclosure unlawful. She also alleges that Cobb ignored here complaints of discriminatory conduct by Birch and Bluegreen.

In a Decision and order dated December 19, 2000, the district court dismissed Ramos's complaint pursuant to Fitzgerald v. First East Seventh Street Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000) (per curiam) (holding that district court may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee). The district court dismissed Ramos's claims against Cobb on the ground of absolute immunity and Ramos's Section 1983 claims against Bluegreen and Birch on the ground that they were not state actors. The district court then noted that Ramos might be able to proceed on the basis of diversity jurisdiction against Bluegreen, and granted her leave to file an amended complaint within 30 days that eliminated Birch and Cobb – both New York residents – as defendants.

Ramos filed a motion for reconsideration, asserting, in part, that the district court's decision had failed to address Ramos's claim pursuant to "Section 101 o the civil Rights Act of 1991 (amending 42 U.S.C.S. 1981)." In a Decision and Order dated February 9, 2001, the district court reiterated its

previous decision and then dismissed Ramos's claims under Section 1981 on the ground that Ramos's complaint contained nothing more than conclusory allegations that Bluegreen and Birch had acted in a discriminatory manner. Mindful that a *pro se* plaintiff should be allowed an opportunity to amend the complaint prior to dismissal for failure to state a claim, however, see Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795-96 (2d Cir. 1999) (per curiam), the district court granted Ramos 30 days in which to file an amended complaint, warning that failure to do so would result in dismissal of her complaint in its entirety.

Ramos did not file an amended complaint, and instead filed this appeal challenging the district court's *sua sponte* dismissal and further arguing that the dismissal and several alleged docketing errors demonstrate additional evidence of intentional discrimination. This Court has not yet ruled as to the standard of review that applies to the *sua sponte* dismissal of a fee-paid claim, such as the one at issue here. See Fitzgerald, 221 F.3d at 364 n.2 (declining to decide standard of review). Whether reviewed for an abuse of discretion or under the more stringent *de novo* standard, however, we conclude that the district court properly dismissed Ramos's complaint for failure to state a claim.

As the district court noted, Cobb was entitled to absolute immunity for his conduct in connection with the foreclosure action and was therefore properly dismissed from the suit. See Pierson v. Ray, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ."); Young v. Selsky, 41 F.3d 47, 51 (2d Cir. 1994) ("Judges enjoy absolute immunity from personal liability for acts committed within their judicial jurisdiction.") (internal quotation marks omitted). The cases relied on by Ramos in challenging this decision are inapposite and have no bearing on whether a judge can be subjected to a civil rights suit or judicial acts performed in a case before him. See Kalina v. Fletcher, 522 U.S. 118, 12-28

(1997) (applying functional approach to determine scope of prosecutorial immunity); Forrester v. White, 484 U.S. 219, 220-21, 229 (1988) (finding no immunity or judge's non-judicial acts as an employer); Mennella v. Lopez-Torres, 91 N.Y. 2d 674, 679 (1994) (noting that "the remedy of mandamus is available to compel a [judge] to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion").

The district court also properly dismissed Ramos's claims under Section 1983, since there was no factual basis to support Ramos's conclusory allegation that Bluegreen and Birch "had acted and continue to act under color of state law." See Giordano v. City of New York,, 274 F.3d 740, 750 (2d Cir. 2001) ("To state a cause of action under § 1983, [plaintiff] must allege (1) that the defendants deprived him of a right secured by the Constitution or laws of the United States; and (2) that they did so under color of state law." (internal quotation marks omitted)).

The district court also properly determined that Ramos's complaint contained only conclusory allegations of intentional discrimination that were insufficient to support a claim under Section 1981. See Yusuf v. Vassar Coll., 35 F.3d 709, 713-14 (2d Cir. 1994) (holding that a § 1981 claim "must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent"); Albert v. Carovano, 851 F.2d 561, 572 (2d Cir. 1988) (en banc) (holding that § 1981 claim failed to state claim because allegations were "too conclusory"). On appeal, Ramos seeks to argue the merits of the her Section 1981 claim, asserting that the district court's decision should be reversed because she presented *prima facie* case discrimination and because the *sua sponte* dismissal by the district court occurred before appellees had any obligation to produce evidence of a legitimate, non-discriminatory explanation or their conduct. Finally, to the extent Ramos is seeking a review of the merits of the state court's decision in the foreclosure action, the

district court lacked jurisdiction to do so under the Rooker-Feldman doctrine. See D.C. court of Appeals v. Feldman, 460 U.S. 462, 482-87 & n.16 (1983) (holding that district courts do not have jurisdiction to review state court decisions or claims "inextricably intertwined" with the merits o the state court determination); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

s/

By: _____
Chandella Armstrong, Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK10007

US COURT OF APPEALS
FILED
JULY 18, 2002
ROSEANN B.
MACKECHNIE, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of July, two thousand and two.

----------x

NORA Z. RAMOS,

Plaintiff-Appellant,

v. Docket No. 01-9013

GEORGE L. COBB, as Justice of the Supreme Court of the State of New York, County of Greene; BLUEGREEN CORPORATION, as Successor in Interest to Patten Corporation), and ROBERT W. BIRCH, ESQ.,

Defendants-Appellees.

----------x

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Nora Z. Ramos.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

BEST AVAILABLE COPY

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

APPENDIX 3

STATE OF NEW YORK
SUPREME COURT : COUNTY OF GREENE

PATTEN CORPORATION (or BLUEGREEN CORPORATION, as Successor in Interest to Patten Corporation),

Plaintiff,

-against-

NORA Z. RAMOS, ASSOCIATION OF PROPERTY OWNERS OF SLEEPY HOLLOW LAKE, INC., SLEEPY HOLLOW LAKE SEWERAGE COMPANY, INC., FIRST AGRICULTURAL BANK, RALPH AMBROSIO, AS TRUSTEE OR THE ASSOCIATION OF PROPERTY OWNERS OF SLEEPY HOLLOW LAKE, INC., and "JOHN DOE" and "JANE DOE" ("Doe" Defendants are fictitious names and intended to be any party in possession of any part of the mortgaged premises),

Defendants.

STATE OF NEW YORK
SUPREME COURT :
COUNTY OF GREENE
September 8, 2000
10:23 AM
94-848

(Supreme Court, Greene County Special Term, May 16 and June 20, 2000. RJI 19-97-7274)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Schlather & Birch (Robert W. Birch of counsel), for plaintiff.

Nora Z. Ramos, defendant pro se.

COBB, J.

Defendant Ramos has moved by order to show cause returnable May 16, 2000, to dismiss the summons and complaint pursuant to CPLR 3211 (a) 7 on the ground that there is no valid cause of action and CPLR 3211 (a) 8 on the ground of lack of personal jurisdiction. She has also moved by order to show cause returnable June 20, 2000, to vacate a judgment of foreclosure and sale in addition to the relief sought in the May 16, 2000 motion.

By prior motion in 1997, defendant Ramos moved to vacate a prior judgment of foreclosure and sale based upon excusable default. She did not seek dismissal of the action based upon lack of jurisdiction. As such, the issue of personal jurisdiction was waived (*David v. Barnes*, 130 AD2d 703). Furthermore, defendant's allegations with respect to jurisdiction contain only a conclusory assertion that she was not served in 1994, and a further claim that she does not now reside at 40-02 Ithaca Street, East Elmhurst, New York. However, the fact that she does not now reside at Ithaca Street in Elmhurst is irrelevant to whether jurisdiction was obtained in 1994. In addition, she has submitted statements that she was not at home from May through August of 1994, because she was in Europe, was showing and renting an apartment for friends, and was attending a dying friend and then renovating said friend's house. However, there is no statement whatsoever that any of such absences were intended to be permanent or that she in fact had moved from her residence. As such, there is no showing whatsoever that service was not effected at her actual dwelling place or usual place of above. Accordingly, defendant has failed to show any lack of personal jurisdiction.

With respect to defendant's objections concerning the Banking Law, they appear to be entirely without merit. Defendant contends that the mortgage is void and unenforceable because it applies to vacant land, and therefore does not come within the definition of a mortgage loan with respect to Article 12-D of the Banking Law. However, such article is by its terms applicable only to residential mortgages. The fact that the article is inapplicable

to mortgages on vacant property or commercial property does not render the mortgage invalid or unenforceable.

Defendant also contends that the mortgage is void pursuant to paragraph 1 of section 355 of the New York Banking Law. Such section prohibits usurious loans. However, there is no showing whatsoever that the loan in question, which is for prime plus 2%, exceeded the allowable rate of interest pursuant to section 14-a of the Banking Law and the regulations promulgated thereon. Defendant has therefore failed to show any defect in the mortgage rendering it unenforceable.

While defendant may have shown a justifiable excuse for her second major default in answering, she has not shown any defense to the action for foreclosure, nor has she offered any proof that the determination of the referee as to the amount due and owing is in error. Accordingly, the motion to dismiss and the motion to vacate the judgment of foreclosure and sale are hereby denied in all respects.

SO ORDERED.

Dated at Catskill, N.Y.

August 29, 2000

s/
GEORGE L. COBB
Justice of the Supreme Court

Papers submitted returned to attorneys for plaintiff.

Order to show cause signed on May 5, 2000; affidavit of Nora Z. Ramos sworn to on May 1, 2000; answer verified May 1, 2000; exhibits A, 1-12, A-H.

Affidavit of Robert W. Birch sworn to on May 15, 2000; exhibits A-H.

Order to show cause signed by Judge Cobb; affidavit of Nora Z. Ramos sworn to on May 30, 2000; exhibits A-C, 8,10, 12, D-G, A-H.

Affidavit of Robert W. Birch sworn to on June 15, 2000; exhibits A-B.

Affidavit of Nora Z. Ramos sworn to on June 19, 2000.

APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U.S DISTRICT COURT
N.D. OF N.Y.
FILED
DECEMBER 19, 2000
AT _ O'CLOCK _
Lawrence K. Baeman,
Clerk-Binghamton

NORA Z. RAMOS,

Plaintiff,

v. 1:00-CV-1810 (TJM)(DRH)

GEORGE L. COBB, Hon. as Justice of the Supreme Court of the State of New York, County of Greene; BLUEGREEN CORPORATION, as Successor in Interest to Patten Corporation); ROBERT W. BIRCH, ESQ.,

Defendants.

APPEARANCES: OF COUNSEL:

FOR THE PLAINTIFF:
NORA Z. RAMOS
Plaintiff, *pro se*
PO Box 70-1190
East Elmhurst, NY 11370-3190

THOMAS J. MCAVOY, U.S. DISTRICT JUDGE

DECISION and ORDER

Background

Presently before the Court is a complaint filed by plaintiff Nora Z. Ramos ("plaintiff" or "Ramos"). Because two of the three defendants named by plaintiff in her pleading are

absolutely immune from this lawsuit as is more fully discussed below, the Court orders plaintiff to file an amended complaint herein should she wish to avoid the dismissal of her action.[3]

In her *pro se* complaint, plaintiff contends that Bluegreen Corporation ("Bluegreen"), the successor in interest to Patten Corporation, wrongfully foreclosed on Ramos's former residence in Catskill, New York ("subject property"). Defendant Supreme Court Justice George L. Cobb is claimed to have, *inter alia*, wrongfully failed to vacate a judgment of foreclosure concerning the subject property, while defendant Robert Birch, Esq., is claimed to have been the attorney for Bluegreen. For a more complete statement of Ramos's claims, reference is made to the complaint filed herein.

Discussion

Initially, the undersigned notes that plaintiff claims jurisdiction on this action under three statutes (i) 42 U.S.C. § 1983; (ii) 28 U.S.C. § 1343 and (iii) 18 U.S.C. § 241. Compl. at ¶ 5. As 18 U.S.C. § 241 is a criminal statute, it affords plaintiff no basis for jurisdiction in this civil action. Thus, this matter will be viewed as one brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

Turning to the substance of plaintiff's claims, her complaint against Judge Cobb relates to his conduct as judge over proceedings involving the foreclosure of the subject property. However, the law in this Circuit clearly provides that "[j]udges enjoy ***absolute immunity*** from personal liability for 'acts committed within their judicial jurisdiction.'" Young v.

---

[3] A district court has the power to dismiss a complaint sua sponte for failure to state a claim so long as the plaintiff is given notice and an opportunity to be heard. *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991) (per curiam); *Fitzgerald v. First*

East Seventh St. Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000) (District Court may dismiss frivolous complaint sua ponte notwithstanding fact the plaintiff haspaid statutory filing fee).

Selsky, 41 F.3d 47, 51 (2d Cir. 1994) (emphasis added) (quoting *Pierson v. Ray*, 386 U.S. 547 (1967). "The absolute immunity of a judge applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Young*, 41 F.3d at 51 (internal quotations omitted). Thus, Ramos's complaint must be dismissed as to defendant Cobb.

With respect to defendant Birch, the court notes that no state action has been – or could properly be – alleged as to the actions of this defendant in pursuing the foreclosure relating to the subject property. State action is a requirement for jurisdiction under 28 U.S.C. § 1343 and an element of a claim for relief under 42 U.S.C. § 1983. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987); *Birbeck v. Southern England Production Credit Ass'n*, 606 F.Supp.1030, 1045 (D.Conn. 1985). Thus, plaintiff's complaint must be dismissed as to defendant Birch.

As to the remaining defendant, Bluegreen, there is likewise no state action alleged by plaintiff as to this defendant. However, Ramos contends that she is a resident of New York, and that this defendant is a resident of Florida. Compl. at ¶¶1, 3. Thus, it appears that diversity of citizenship may exist between these two parties. However, since ***complete*** diversity of citizenship is necessary for federal jurisdiction to be present, see *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (citing 28 U.S.C. § 1332)), and plaintiff identifies herself, as well as defendants Cobb and Birch, as citizens of New York, it is clear that an amended complaint must be filed for this action to properly proceed.

Any such amended complaint, **which shall supersede and replace in its entirety the previous complaint filed by plaintiff**, must contain a caption that clearly identifies, by name, each individual and/or entity that Ramos is suing in the present lawsuit. **As noted above, such pleading may not assert claims against defendants Cobb or Birch**. The body of plaintiff's complaint must contain **sequentially**

numbered paragraphs containing only one act of misconduct per paragraph.

While plaintiff may attach exhibits to her amended complaint, she shall not incorporate them by reference as a means of providing the factual basis for her claims. Thus, Ramos must name the individuals whom she seeks to include as defendants herein in both the caption and the body of her amended complaint; she may not rely on the fact that individuals are named in the exhibits attached to her amended complaint as a means of including such persons as defendants to this lawsuit. Plaintiff may, of course, attach exhibits to her amended complaint, however, the Court will not independently examine exhibits that plaintiff does not specifically reference (by the exhibit's page number) in her amended complaint.

Plaintiff's amended complaint shall be filed with the Court within thirty (30) days from the date of the filing of this Order. Plaintiff is further cautioned that no portion of any prior complaint shall be incorporated into her amended complaint by reference. Plaintiff shall submit only one amended complaint in accordance with the terms of this Order. Therefore, **plaintiff shall state in the single amended complaint filed in accordance with the terms of this Order all claims that she wishes this Court to consider as a basis for awarding plaintiff relief herein; her failure to file such a pleading will result in dismissal of this action without further Order of the Court**.

The Clerk shall forward this file to the Court upon the filing by Ramos of an amended complaint in compliance with the terms of this Order.

WHEREFORE, it is hereby

ORDERED, that plaintiff file with the Court **within thirty (30) days** from the date of the filing of this Order, an amended complaint which complies fully with Rules 8 and 10 of the Federal Rules of Civil Procedure and the terms of this Order as detailed above, and it is further

ORDERED, that if plaintiff fails to file such an amended complaint within thirty days from the date of the filing of this Order, the instant action be dismissed without further order of this Court due to plaintiff's failure to comply with the terms of this order and requirements of the above-mentioned Federal Rules, and it is further

ORDERED, that if plaintiff fails to allege specific acts of misconduct as to any of the individuals named in any amended complaint filed herein, the instant action be dismissed with respect to the individuals against whom the plaintiff has failed to allege specific acts of misconduct, and it is further

ORDERED, that upon the filing of plaintiff's amended complaint as directed above, the file in this matter be returned to the Court for further review, and it is further

ORDERED, that any future action filed by plaintiff comply with the Local Rules of Practice of this District, and it is further

ORDERED, that the Clerk serve a copy of this Order on the plaintiff by regular mail.

IT IS SO ORDERED.

Dated: December 14, 2000
Albany, New York

s/
Thomas J. McAvoy
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NORA Z. RAMOS,

Plaintiff,

-against-

00-CV-1810

Hon. GEORGE L. COBB, as Justice of the Supreme Court of the State of New York, County of Green; PATTEN CORP. (or BLUEGREEN CORPORATION, as Successor in Interest to PattenCorporation), and ROBERT W. BIRCH, Esq.,

Defendants.

U.S DISTRICT COURT-
N.D. OF N.Y.
FILED
FEBRUARY 9, 2001
AT _ O'CLOCK
Lawrence K. Baeman,
Clerk Binghamton

DECISION & ORDER

McAvoy, D.J.

On November 28, 2000, Plaintiff, appearing *pro se*, filed a Complaint in the instant action alleging violations of her civil rights pursuant to 42 U.S. C. § 1983, 42 U.S.C. § 1981, and 18 U.S.C. § 241.[4]

On December 19, 2000, the Court issued an order dismissing the Complaint against Judge Cobb pursuant to the doctrine of absolute judicial immunity as the Complaint relates to Judge Cobb's conduct in judicial proceedings involving the foreclosure of certain property. Dkt. No. 6.

The Court further noted that Plaintiff did not allege state action as to the actions of Defendants Birch and Bluegreen Corporation. 42 U.S.C. §1983. On this basis, the Court found that Plaintiff' s Complaint did not allege viable federal claims against any of the Defendants and, thus, dismissed the Complaint.

[4]18 U.S.C. § 241 is criminal statute which affords no jurisdictional basis for the instant action.

Due to the fact that the Complaint alleged that Plaintiff was a resident of New York and that Bluegreen is a resident of Florida, the Court noted the possibility of diversity jurisdiction. However, because the Complaint did not allege complete diversity (defendants Cobb and Birch are listed as New York residents), the Court afforded Plaintiff thirty (30) days to file an amended complaint providing a proper jurisdictional basis.

To date, Plaintiff has not filed an amended complaint. Plaintiff has, however, filed a motion for reconsideration. Because Plaintiff's motion for reconsideration does not cure the defects in the original Complaint by properly alleging state action and/or conduct not protected by immunity, Plaintiff's motion to reconsider that portion of the decision dismissing Plaintiff Section 1983 claims the claims against Judge Cobb is DENIED[5]. The Court will next consider Plaintiffs 42 U.S.C. § 1981 claim.

Although Plaintiff is correct that the December 19, 2000 decision did not specifically address her 42 U.S.C. § 1981 claim, Plaintiff's argument that she has stated such a claim is unpersuasive. Section 1981 provides, in pertinent part, "all persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Plaintiff's Complaint appears to argue that Defendants did not correctly apply certain provisions of the New York Banking Law to her in prior state court proceedings for discriminatory reasons.

First, this claim must be dismissed against Judge Cobb pursuant to the doctrine of judicial immunity. As to the other Defendants, the Complaint must be dismissed because, other than her conclusory allegations that Defendants acted in a discriminatory manner, Plaintiff's Complaint contains absolutely no mention of anything indicating that Defendants'

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[5]Plaintiff's motion is also untimely. N.D.N.Y.L.R. 7.1(g).

actions were intentional discriminatory. Albert v. Caravano, 851 F.2d 561, 571 (2d Cir. 1988) (finding that 42 U.S.C. § 1981 only protects against those acts that are purposefully discriminatory and racially motivated.); Mian v. Donaldson, Lufkin, Jenrette, Securities Corp., 7 F.3d 1085 (2d Cir. 1993) (stating that conclusory allegations of discrimination are not sufficient to survive motion to dismiss).

Because the Court acted *sua sponte* in addressing the merits of the Complaint, the Court will grant Plaintiff thirty (30) days to file an amended complaint properly alleging violations of 42 U.S.C. § 1981. Fitzgerald v. First East Seventh St. Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000). Any such amended complaint will supersede and replace in its entirety the previous complaint, and must contain a caption that clearly identifies, by name, each individual defendant. As noted above, such pleading may not assert claims against Defendant Cobb for conduct relating to his judicial function. The body of Plaintiff's amended complaint must contain sequentially numbered paragraphs containing only one act of misconduct per paragraph and must allege supporting her claims.

Plaintiff's amended complaint shall be filed with the Court **within thirty (30) days** from the date of this Order. Plaintiff is cautioned that no portion of any prior complaint shall be incorporated into her amended complaint by reference. Further, Plaintiff is on notice that if the amended complaint does not correct the defects discussed herein the amended complaint will be dismissed and if Plaintiff fails to file an amended complaint compliant with the terms of this Order within the thirty (30) day time period, this action will be dismissed in its entirety.

Wherefore, it is hereby

ORDERED, that Plaintiff's motion for reconsideration is granted in part and denied in part, and it is further

ORDERED, that Plaintiff file with the Court within thirty (30) days of the date of this Order an amended complaint that complies fully with Rules 8 and 10 of the Federal Rules of Civil Procedure and the terms of this Order as detailed above, and it is further

ORDERED, that if Plaintiff fails to file such an amended complaint within (30) days of the date of this Order, the instant action be dismissed without further order of the Court due to Plaintiff's failure to comply with the terms of this Order and the requirements of the above mentioned Federal Rules, and it is further

ORDERED, that Defendants Bluegrass and Cobb's motions to dismiss are DENIED without prejudice as moot as there is currently no active complaint pending before the Court.

IT IS SO ORDERED

February 9, 2001
Binghamton, New York

s/

Hon. Thomas J. McAvoy
U.S. District Judge

APPENDIX 6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NORA Z. RAMOS,

Plaintiff,

-against- 00-CV-1810

Hon. GEORGE L. COBB, as Justice of the Supreme Court of the State of New York, County of Green; PATTEN CORP. (or BLUEGREEN CORPORATION, as Successor in Interest to Patten Corporation), and ROBERT W. BIRCH, Esq.,

Defendants.

U.S DISTRICT COURT-
N.D. OF N.Y.
FILED
FEBRUARY 22, 2001
AT _ O'CLOCK
Lawrence K. Baeman,
Clerk Binghamton

ORDER

McAvoy, D.J.

On February 9, 2001, this Court issued a Decision & Order that, *inter alia*, denied Defendant "Bluegrass's" motion to dismiss without prejudice. That portion of the February 9, 2001 order is hereby amended to state:

"ORDERED, that Defendant Bluegreen's motion to dismiss is DENIED without prejudice as moot as there is currently no active complaint pending before the Court." FED. R. CIV. P. 60 (a).

IT IS SO ORDERED

February 22, 2001
Binghamton, New York

s/

Hon. Thomas J. McAvoy
U.S. District Judge

APPENDIX 7

CPLR 308 – Personal service upon a natural person

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual placed of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, which is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, which is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, I service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

APENDIX 8

CPLR 5015: Relief from judgment or order (8a)

(a) On motion. The court which rendered a judgment or oder may relieve a party from it upon such terms as may be just on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404, or

3. fraud, misrepresentation, or other misconduct of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal, modification or vacatur off a prior judgment or order upon which it is based.

(a) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(b) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon, appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

(c) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

APPENDIX 9

42 U S C 1983 as Amended by Federal Courts Improvement Act of 1996:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress, except that in any action brought against a judicial officer for an act of omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."